No. 78-1063

In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

MCI COMMUNICATIONS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
RON M. LANDSMAN
Attorneys
Department of Justice
Washington, D.C. 20530

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1063

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

MCI COMMUNICATIONS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-8a) and the district court (App., *infra*, 1a-7a) are not reported.[1]

[1] Rule 23(1)(i) of the Rules of this Court requires the petition for certiorari to contain "all opinions of courts or administrative agencies in the case." Petitioners neglected to reproduce the opinion of the district court; we have reproduced it as an appendix for this Court's convenience.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1978. The petition for a writ of certiorari was filed on January 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in permitting counsel for plaintiffs in a private suit to disclose to and discuss with counsel for the United States, which is the plaintiff in a suit charging the same antitrust violations, relevant non-privileged documents and depositions obtained in discovery.

STATEMENT

On November 20, 1974, the United States filed a civil action charging petitioners with monopolization, attempted monopolization, and conspiracy to monopolize telecommunications service and telephone equipment, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[2] This case is one of the largest antitrust suits ever filed and litigated by the United States. Almost from the start, however, proceedings were stayed as petitioners pressed in the district court, the court of appeals and this Court the argument that the case should be dismissed on the ground of implied

[2] *United States* v. *American Telephone & Telegraph Co.*, Civ. No. 74-1698 (D.D.C.).

antitrust immunity.[3] Significant discovery did not begin in the suit until more than three years after its filing.

At that time discovery was far advanced, or even completed, in some of the private antitrust cases that had been filed against AT&T. The United States realized that it could greatly reduce the cost and greatly increase the pace of pretrial proceedings if it could streamline the traditional multi-million page document searches and the depositions that typify "big" cases by using the discovery already accomplished in private cases involving claims similar to those of the present case.

One such case is respondent MCI's suit, begun in August 1974. It charges AT&T with the same anticompetitive conduct that forms the basis for part of the government's suit,[4] and thus material relevant to MCI's case also is relevant to the government's case. Discovery in this private case is largely completed (App., *infra*, 3a). MCI has reviewed seven million pages of AT&T's documents and selected 1.5 million pages as relevant, and it has deposed 40 of AT&T's employees. MCI has copied, microfilmed, analyzed and indexed the documents and depositions. AT&T in turn has reviewed eight million pages of

[3] *United States* v. *American Telephone & Telegraph Co.*, 427 F. Supp. 57 (D.D.C. 1976), cert. before judgment denied, 429 U.S. 1071 (1977), cert. denied, No. 77-1009 (D.C. Cir. May 26, 1977), cert. denied, 434 U.S. 966 (1977). Petitioners continue to press this issue.

[4] The government's case challenges much anticompetitive conduct not involved in *MCI*.

MCI's documents and deposed 140 current and former employees of MCI.

MCI and AT&T conducted discovery under a protective order, issued on the consent of the parties, which provided that disclosure of documents in discovery would not waive claims of attorney-client privilege or work product.[5] Thus all documents would "initially be treated as confidential material," and all depositions would be treated as confidential on designation of the deposed party (Pet. App. 11a ¶ 4). AT&T designated every page as confidential, often before the deposition had commenced, subject to the proviso in the protective order that confidentiality was subject to "further order of court." The order also provided that "any other party may file a motion with the Court that such material should not be deemed confidential" (Pet. App. 12a ¶ 5).

In November 1977 the United States asked the district court to allow MCI's counsel to disclose to it copies of the depositions of AT&T's employees and the documents produced by AT&T for MCI and selected by MCI's counsel as relevant.[6] AT&T opposed the request. After briefing and oral argument, the district court indicated its agreement with the government's position, but it declined to grant the government's motion until it could ascertain whether the district court in the District of Columbia had any objection to modifying the protective order (Dec. 7, 1977 Tr. 37-38).

[5] Parties could thus preserve claims of privilege for determination by the court.

[6] It also asked the court to allow MCI's counsel to discuss the case freely with government counsel. MCI filed a motion of its own seeking the same relief. The United States sought similar relief in *Litton Systems, Inc.* v. *AT&T*, No. 76 Civ. 2512 (S.D.N.Y.).

The District of Columbia court stated that it had no objection to the *MCI* court's proposed order; the District of Columbia court also ordered AT&T to produce microfilm copies in its possession of the documents MCI had selected, but it also sought the *MCI* court's endorsement.[7]

The *MCI* court gave that endorsement when it granted the government's motion for access to discovery. The court found that permitting disclosure would not "in any way hamper or compromise our control over this case" or, in light of the District of Columbia court's opinion and order, interfere with orderly management of the government's case (App., *infra*, 2a). The *MCI* court also found that disclosure would not be unfair to AT&T. The United States had the right to obtain in its own case all the information it sought from MCI, for the material at issue was relevant and not privileged (*id.* at 3a). AT&T's contention that it relied on the order to provide "perpetual secrecy" was unsound because the order "is in terms subject to change by further order of court" (*id.* at 4a). Finally, the court found

[7] AT&T sought review of this order, but both the court of appeals and this Court denied review. The district court's opinion is reproduced as an appendix to the petition in *AT&T* v. *United States*, No. 78-761, cert. denied (Jan. 8, 1979).

incredible AT&T's contention that it had relied on an alleged promise by government counsel never to seek access to private plaintiff's discovery (*id.* at 6a).

The court of appeals affirmed (Pet. App. 1a-8a).[8] It rejected AT&T's contention that district courts have no power to permit disclosure to third parties of materials produced under a protective order (Pet. App. 6a). It then held that the district court did not abuse its discretion in permitting MCI to disclose and discuss discovery material (*id.* at 6a-8a), because there was no contention that the United States was "exploit[ing]" the private cases to obtain information (*id.* at 7a).

On January 2, 1979, the court of appeals denied AT&T's motion for stay pending review by this Court, and Mr. Justice Stevens denied an application for a stay on January 3, 1979. MCI turned over the material and began consultation with government counsel on January 4, 1979.

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or another court of appeals, and does not warrant plenary review.[9]

[8] The court simultaneously denied AT&T's petition for a writ of mandamus (Pet. App. 5a).

[9] The court of appeals held (Pet. App. 4a-5a) that it had jurisdiction to review by appeal the district court's modification of its protective order. We believe that this holding is erroneous. Several courts of appeals have held that modifications of protective orders can be reviewed, if at all, only by mandamus. See, *e.g.*, *Iowa Beef Processors, Inc.* v. *Bagley*, No. 78-1855 (8th Cir. Feb. 7, 1979), petition for cert. pending, No. 78-1281; *In re Halkin*, No. 77-1313 (D.C. Cir. Jan. 19, 1979). 28 U.S.C. 1291 provides that courts of appeals can review by appeal only "final decisions" of district courts. An order with respect to discovery—whether it be an order to make discovery, the imposition of a protective order, or the lifting of a protective order—is one of the potentially hundreds of interlocutory decisions that are necessary in protracted litigation. Like other interlocutory orders, it can be reviewed on appeal from any final judgment. If the modification of the protective order should cause AT&T prejudice in the *MCI* litigation, any error would be ground for reversal on appeal in *MCI*. If the modification should prejudice AT&T in the government's antitrust case, any error might be ground for relief on appeal in that case. But the modification is not ground for immediate appeal. Cf. *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, No. 78-3041 (2d Cir. Jan. 17, 1979) (Friendly, J.) (an order to produce evidence cannot be appealed).

The court of appeals relied on the "collateral order" rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). To be appealable under this rule, an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). As we argued above, the modification of a protective order, at least when the modification is in favor of release, is not effectively unreviewable. Moreover, the terms of protective orders are not, as a class, so important that they should be the subject of immediate review. District courts have substantial discretion

1. Petitioners argue that district courts lack the authority to allow disclosure for use in other litigation of material subject to protective orders (Pet. 5-7). This contention is groundless.

No court has held that a district court lacks authority to permit disclosure to third party litigants of materials produced under its protective order. Indeed, the only court of appeals that previously had addressed the matter in a published opinion held that, under the circumstances of that case, it was an abuse of discretion *not* to permit a third party access to material covered by the protective order. *Olympic Refining Co.* v. *Carter*, 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964). Moreover, after the decision by the Seventh Circuit here, the Second Circuit held that protective orders "are subject to modification to meet the reasonable requirements of parties in other litigation * * *." *United States* v. *GAF Corp.*, No. 78-6102 (2d Cir. Feb. 9, 1979), slip op. 1310. Numerous district courts have approved disclosure to third parties for use in their litigation,[10] and these

concerning protective orders, and any truly outrageous decision can be reviewed by mandamus. (The fact that this particular protective order may be important to petitioners does not give jurisdiction to the court of appeals. Appealability must be determined by the characteristics of the class of orders, not by the characteristics of particular orders. *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978).)

There is no need, however, to resolve in this case the conflict among the circuits concerning appellate jurisdiction. The court of appeals took the position most favorable to petitioners, and they still did not prevail.

[10] See *Uinta Oil Refining Co.* v. *Continental Oil Co.*, 36 F.R.D. 176, 183 (D. Utah 1964), aff'd, 340 F.2d 993 (10th Cir. 1965); *Essex Wire Corp.* v. *Eastern Electric Sales Co.*, 48 F.R.D. 308 (E.D. Pa. 1969); *American Securit Co.* v. *Shatterproof Glass Corp.*, 20 F.R.D. 196 (D. Del. 1957); *United States* v. *International Business Machines Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975).

holdings are consistent with the principle that discovery in civil litigation presumptively is to be conducted in public. *In re Halkin*, No. 77-1313 (D.C. Cir. Jan. 19, 1979).

To be sure, a number of district courts have exercised their discretion to deny disclosure.[11] In none of

[11] See, *e.g.*, *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 F.R. Serv. 2d 1251 (N.D. Cal. 1974) (burden on the court to review privilege claims); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 CCH Trade Cases ¶ 61,961 (E.D. Pa. 1976) (risk of confusing further already chaotic discovery proceedings); *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D.N.Y. 1972) (motion for broad permission to disclose all material made with other obstructive and dilatory motions denied); *Martindell* v. *International Telephone and Telegraph Corp.*, 25 F.R. Serv. 2d 1283 (S.D.N.Y. 1978), aff'd, No. 78-6074 (2d Cir. Feb. 14, 1979) (government not yet a litigant, was looking toward criminal proceedings, and important Fifth Amendment considerations were involved); *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976) (disclosure to the government, which was not yet a litigant, of an adverse party's selection of documents might unfairly influence the government's exercise of its uniquely broad discretion whether to initiate prosecution).

Less helpful to AT&T is *United States* v. *GAF Corp.*, 449 F.Supp. 351 (S.D.N.Y. 1978), which involved the reach of the government's investigatory power under the 1976 amendments to the Antitrust Civil Process Act, and which was recently reversed. *United States* v. *GAF Corp.*, No. 78-6102 (2d Cir. Feb. 9, 1979). Similarly, *Alcoa* v. *U.S. Department of Justice*, 1978-1 CCH Trade Cases ¶ 61,824 (D.D.C. 1978), involved a question of procedure under the 1976 Antitrust Civil Process Act amendments. *United States* v. *ARA Services, Inc.*, 1978-2 CCH Trade Cases ¶ 62,250 (E.D. Mo. 1978), vacated, No. 77-1165-C(1) (E.D. Mo. Nov. 7, 1978), involved the government's request to defendants for their own documents, which happened to be the subject of discovery and a protective order in another proceeding.

those cases, however, did the court hold or even suggest that it lacked the authority to permit third parties to have access to materials produced pursuant to a protective order.

Petitioners' position disregards the rule that district courts have broad discretion in administering protective orders. See, *e.g.*, *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977); *Galella* v. *Onassis*, 487 F.2d 986 (2d Cir. 1973). A court that has the authority to deny a protective order altogether surely has the authority to provide for disclosure to a party with a special need for documents that are otherwise still kept from public view. Relaxation of a protective order can promote the speedy, inexpensive and just determination of another judicial proceeding, thereby promoting the goals of the Federal Rules. Fed. R. Civ. P. 1. Sharing of discovery also is consistent with the Multi-District Litigation Act, 28 U.S.C. 1407.[12]

2. Petitioners' apparent contention that the district court abused its discretion (Pet. 6-9) is insubstantial. The district court concluded that disclosure will save substantial time and effort in the government's case, will not interfere with MCI's case, and will not prejudice AT&T. The findings on which those conclusions rest are correct. The material at issue is relevant and non-privileged, and thus it is all discoverable in the government's case (App., *infra*, 3a). Disclosure to the government now will speed

[12] Although Section 1407 is inapplicable in government antitrust cases, the principles underlying the statute show that litigation on a single issue is not to be compartmentalized.

progress in the government's case by avoiding costly and needless duplication of effort, and it will not interfere with the conduct of the *MCI* case, because that discovery is finished. Moreover, contrary to AT&T's claim (Pet. 12-14), disclosure will not prejudice AT&T in the conduct of its litigation against the government, because all of the material could be discovered—eventually—in other ways. The procedure simply shortcuts the need for repetitious depositions and repetitious examination of mountains of documents.

3. Petitioners' contention (Pet. 14-17) that it is improper for MCI's counsel to discuss the case with the government's counsel because discovery originally proceeded pursuant to a protective order fails with the modification of the protective order. Petitioners overlook the original and only reason for prohibiting such discussion: to buttress the confidentiality given the documents and depositions. Once the underlying documents and depositions are disclosed to a third party, the reason for restricting discussion of them with the third party's counsel vanishes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

ROBERT B. NICHOLSON
RON M. LANDSMAN
Attorneys

MARCH 1979

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 633

MCI COMMUNICATIONS CORPORATION, ET AL.,
PLAINTIFFS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
ET AL., DEFENDANTS

MEMORANDUM DECISION

The motion of the United States to permit access to pretrial discovery and cooperation of counsel is allowed.

The voluminous materials filed in connection with this motion since we first considered it in December of 1977 have done nothing to change our perception of the basic issues presented nor our initial impression as to how they should be resolved. Basically, we were concerned with two questions: First, whether allowing the Government's motion would interfere with the control this court or the District of Columbia court has over the case and the litigants before it; second, whether granting the Government's motion would unfairly prejudice the defendants.

On the first question, there is nothing about allowing MCI to turn over materials to the Government

that would in any way hamper or compromise our control over this case. And, as we will indicate shortly, we do not believe such court approved co-operation by MCI would violate the intent of the protective order signed by Judge Lynch. Certainly, it will not violate what we consider to be the proper scope of such a protective order.

The defendants' principal argument was that our granting the Government's motion would interfere with Judge Waddy's control over the timing and sequence of discovery in the District of Columbia case. Any doubt about the desires of the judge handling the District of Columbia case has been forcefully dispelled by the opinion of Judge Harold H. Greene, filed September 11, 1978. Judge Greene, who took over the case upon Judge Waddy's death, has clearly stated that the efficient conduct of the case requires that AT&T turn over to the Government all of the documents it produced for MCI in this case. He denied without prejudice the defendants' motion to compel production of the deposition transcripts and associated exhibits in this case because he had not been informed by the Government as to whether considerations other than those which pertain to the microfilmed documents might be involved. (Opinion, p. 46, n.91). We know of no such additional considerations, and therefore, insofar as the lifting of this court's protective order is concerned, MCI will be authorized to make available to the Government the deposition transcripts and attached exhibits as well as the microfilmed exhibits.

We agree wholly with Judge Greene's comments about the desirability of avoiding unnecessary duplication of discovery in these two cases. Absent any element of unfairness which might be presented by the facts peculiar to a particular case, we believe the court should not only encourage the sharing of discovery in cases with common fact questions but order it on its own motion even where the parties do not suggest it. Certainly, such a philosophy is consistent with if not essential to the concept of multi-district litigation.

Turning now to the issue of unfair prejudice, this breaks down into an analysis of two things upon which the defendants claim they have relied, to their detriment. First, defendants say they relied upon the pretrial order of August 6, 1974. Second, they claim to have relied upon a categorical assurance by a Department of Justice Attorney, made on December 19, 1974, to the effect that the Government would never seek to obtain from MCI any of the documents produced by AT&T in this litigation. Defendants say that in reliance upon each of these things, they produced documents for MCI which the Government would not be entitled to obtain itself by way of discovery in the District of Columbia case.

We believe this reliance argument fails for two reasons. First, the defendants simply have not shown that anything discovered by MCI in this case would be protected from discovery in the District of Columbia case. There is no claim that any privilege objection was waived; indeed, a special master in this case has spent a great deal of time ruling on the many claims of privilege that were asserted. There is no

reason to believe that the rulings would be any different in the District of Columbia. Defendants point to various matters in certain depositions which they say are "embarrassing," but this is a claim we find to be exaggerated and, in any event, without legal significance.

More than this, however, we do not believe that defendants were justified in regarding either the pretrial order or the discussion with the Department of Justice attorneys as constituting a guaranty that material produced to MCI would be protected from discovery by other parties. As far as the protective order is concerned, it is in terms subject to change by further order of court. (Par. 5). It does not purport to furnish a lifetime guaranty, and even if it did, it would be difficult for a sophisticated litigant to take such a grandiose assurance literally. Where the ends of justice require disclosure, as we believe they do here, it would be irresponsible for a court to enforce perpetual secrecy where the sole ground for doing so is simply that one party wants it. There is no indication that Judge Lynch did or said anything which defendants could reasonably have interpreted as the absolute guaranty they now seek to enforce.

The alleged promise by Mr. Verveer, the Department of Justice attorney, that the Government would not seek to obtain documents produced for MCI in this litigation stands on a somewhat different footing than the protective order. This promise, if made, was a commitment by the Government (putting to

one side the question of Mr. Verveer's authority) and, more than that, was a promise made by one lawyer to another. It may be that ethical considerations would require enforcement of such a promise even in the absence of any change of position by the promisee. Therefore, if it were reasonable to believe that the parties understood that Mr. Verveer was making a binding commitment not to seek the results of the discovery in this case at any time, we might well be inclined to enforce that commitment regardless of other considerations. We turn, therefore, to the question of whether the parties did in fact reach such an understanding.

We are satisfied with the Government's explanation of the matter. It does not make sense to us that so significant an undertaking would have occurred so casually and under the circumstances alleged. There was no reason for Mr. Verveer to make such a commitment. There was no negotiation for it and nothing was conceded in return for it. The supposed "categorical" statement is mentioned only incidentally in Mr. Levy's memorandum prepared after the meeting and the Government attorneys present at the meeting made no written note of it at all. This lack of documentation does not seem to us to signal a meeting of minds on what counsel for the defendants calls ". . . an issue of earth-shaking importance to my client." (Transcript of Proceedings of December 7, 1977, p. 9). We have reason to be well aware that counsel in this case do not shrink from paperwork. Had there really been an under-

standing of the kind alleged, there was every reason to reduce it to writing. Aside from the obvious desirability of having documentary evidence that a promise was made at all, it would have been clear to everyone that the exact extent of the commitment should be specified. (The problem in not doing so is illustrated by the fact that while defendants urge the promise as a bar to *any* discovery materials in this case, including depositions, Mr. Levy's contemporaneous memorandum refers only to a statement about "documents.") All counsel anticipated on December 19, 1974, that parallel discovery in the two cases would be ongoing for years and that therefore any agreement reached on that date might be invoked years later by one side or the other. Under these circumstances, competent and responsible counsel who really believed that they had reached agreement on an important issue affecting two cases of this magnitude would not have chosen to rely on memory but would have committed that agreement to writing.

Under all of the circumstances, this court simply does not believe that Mr. Verveer made the commitment attributed to him by defendants. Furthermore, the defendants own conduct at the time is inconsistent with the hypothesis that they thought he had made it.

MCI may forthwith make available to the United States Department of Justice all discovery materials obtained in this case, including documents, deposition transcripts and exhibits referred to in depositions. Counsel for MCI may also cooperate with the Department of Justice by furnishing any explanatory mate-

rial or information which would be helpful to an understanding of the items produced. The intent of this order is to make available to the Government relevant information for use in its case against AT&T now pending in the District Court for the District of Columbia, and, until further order of this court, the information and material furnished to the Government by MCI pursuant to this order shall not be used for any other purpose. If a more specific protective order is thought necessary by any party, we will entertain an appropriate motion.

DATED: October 9, 1978

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 287726 340